

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID MICHAEL BANNING,

Petitioner,

v.

HUTCHINGS, et al.,

Respondents.

Case No. 2:22-cv-00885-RFB-BNW

Order Directing Service of the Petition

This is *pro se* petitioner David Michael Banning's 28 U.S.C. § 2241 habeas petition. He has now paid the filing fee. (See ECF No. 5). The court has conducted a preliminary review of the petition and directs that it be served on respondents.¹

A petition for federal habeas corpus should include all claims for relief of which petitioner is aware. If petitioner fails to include such a claim in his petition, he may be forever barred from seeking federal habeas relief upon that claim. See 28 U.S.C. §2254(b) (successive petitions). If petitioner is aware of any claim not included in his petition, he should notify the court of that as soon as possible, perhaps by means of a motion to amend his petition to add the claim.

¹ The court notes that it is unclear if Banning states claims that are cognizable on federal habeas review or merely asserts state-law claims. A state prisoner is entitled to federal habeas relief only if he is being held in custody in violation of the constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). Alleged errors in the interpretation or application of state law do not warrant habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004); see also *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990) ("noting that [the federal court] ha[s] no authority to review a state's application of its own laws").

1 **IT IS THEREFORE ORDERED** that the Clerk detach, file, and electronically
2 SERVE the petition (ECF No. 1-1) on the respondents.

3 **IT IS FURTHER ORDERED** that the Clerk add Aaron D. Ford, Nevada Attorney
4 General, as counsel for respondents and provide respondents an electronic copy of all
5 items previously filed in this case by regenerating the Notice of Electronic Filing to the
6 office of the AG only.
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8 **IT IS FURTHER ORDERED** that respondents file a response to the petition,
9 including potentially by motion to dismiss, within **90 days** of service of the petition, with
10 any requests for relief by petitioner by motion otherwise being subject to the normal
11 briefing schedule under the local rules. Any response filed is to comply with the
12 remaining provisions below, which are entered pursuant to Habeas Rule 5.
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14 **IT IS FURTHER ORDERED** that any procedural defenses raised by respondents
15 in this case be raised together in a single consolidated motion to dismiss. In other words,
16 the court does not wish to address any procedural defenses raised herein either in
17 seriatum fashion in multiple successive motions to dismiss or embedded in the answer.
18 Procedural defenses omitted from such motion to dismiss will be subject to potential
19 waiver. Respondents should not file a response in this case that consolidates their
20 procedural defenses, if any, with their response on the merits, except pursuant to 28
21 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents
22 do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they will do so within the
23 single motion to dismiss not in the answer; and (b) they will specifically direct their
24 argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*,
25 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses, including
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1 exhaustion, should be included with the merits in an answer. All procedural defenses,
2 including exhaustion, instead must be raised by motion to dismiss.

3 **IT IS FURTHER ORDERED** that, in any answer filed on the merits, respondents
4 specifically cite to and address the applicable state court written decision and state court
5 record materials, if any, regarding each claim within the response as to that claim.
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7 **IT IS FURTHER ORDERED** that petitioner has **45 days** from service of the answer,
8 motion to dismiss, or other response to file a reply or opposition, with any other requests
9 for relief by respondents by motion otherwise being subject to the normal briefing
10 schedule under the local rules.

11 **IT IS FURTHER ORDERED** that any additional state court record exhibits filed
12 herein by either petitioner or respondents be filed with a separate index of exhibits
13 identifying the exhibits by number. The parties will identify filed CM/ECF attachments by
14 the number or numbers of the exhibits in the attachment.
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16 **IT IS FURTHER ORDERED** that, at this time, the parties send courtesy copies of
17 **any responsive pleading or motion and all INDICES OF EXHIBITS ONLY** to the Reno
18 Division of this court. Courtesy copies shall be mailed to the Clerk of Court, 400 S.
19 Virginia St., Reno, NV, 89501, and directed to the attention of "Staff Attorney" on the
20 outside of the mailing address label. **No further courtesy copies are required unless**
21 **and until requested by the court.**
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24 DATED: 25 August 2022.

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27 RICHARD F. BOULWARE, II
28 UNITED STATES DISTRICT JUDGE